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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ELLIOT SCOTT,

Defendant and Appellant.

B230087

(Los Angeles County
Super. Ct. No. LA058472)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Elizabeth A. Lippitt, Judge. Affirmed.

Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Joseph P. Lee and Dana M. Ali, Deputy Attorneys General, for Plaintiff and Respondent.

In a second amended information, appellant Elliot Scott was charged with first degree residential burglary (Pen. Code, § 459,¹ count 1), grand theft of personal property (§ 487, subd. (a), count 2), and two counts of grand theft of a firearm (§ 487, subd. (d)(2), counts 3 & 4). It was alleged that appellant suffered 13 prior felony convictions within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), two prior serious felony convictions (§ 667, subd. (a)(1)), and two prior prison terms (§ 667.5, subd. (b)). Prior to trial, count 2 was dismissed in the interest of justice and the remaining counts were renumbered counts 2 and 3.

A jury found appellant guilty on count 1. Counts 2 and 3 were dismissed after the jury declared itself hopelessly deadlocked. In a bifurcated court trial, all of the prior conviction allegations were found true. Appellant was sentenced to 25 years to life for count 1 pursuant to the Three Strikes law, plus consecutive terms of five years for each of the two prior serious felony convictions.

On appeal, appellant contends that his Sixth Amendment right to confront witnesses was violated by testimony pertaining to DNA evidence, and that his trial counsel provided constitutionally ineffective assistance by failing to object. We affirm.

FACTS

A. Evidence obtained

Lauren Pollack lived with her infant son in a two-bedroom house on Agnes Avenue in Studio City. Pollack knew appellant through her friend Julie. Appellant had visited Pollack’s house with Julie on several occasions.

As Pollack left her house to go to work on the morning of February 14, 2007, she locked the door. The windows to her house were closed.

When Pollack returned home after work, she noticed quarters lying on the floor in the front hallway and red spots nearby. She glanced into her bedroom and saw that

¹ All further statutory references are to the Penal Code, unless otherwise noted.

dresser drawers had been removed and the room was a mess. She immediately left the house and called the police and her father.

The police arrived about an hour later, and Pollack and her father accompanied them inside. Pollack's bedroom window had been broken and the window screen removed. Jewelry, a briefcase holding about \$1,000 in cash, and two handguns were missing from the closet. A purse, a diaper bag, pillow cases, and a cupful of change had also been taken.

More red spots were found on the floor of Pollack's bedroom, and a red smear was found on her couch. A trash can had been pushed up against the fence separating her front yard from the back.

The next day, a police photographer with the Los Angeles Police Department, Karen Coogle, took photographs at the house. She also collected three "swubes" (described as an "individually wrapped, sterile, cotton stick applicator") from red spots—one on the bedroom floor near the broken window, one on the bedroom closet door, and one on the couch. These and other items collected by Coogle at the scene were booked into evidence.

Los Angeles Police Department Detective Andres Alegria knew appellant by the name "Frank Scott." He located appellant at the county jail on June 7, 2007, and took a saliva sample from his mouth. Protocol called for Alegria to wear gloves when taking the sample, but he did not have gloves when he met with appellant, so did not use them. Alegria testified that he was careful not to touch the cotton part of the swab used to obtain the saliva sample.

Meghan Cirivello, a criminalist in the Serology DNA Unit of the Scientific Investigation Division, obtained the oral swab from the evidence control section. She documented the condition of the swab in her notes, made a cutting of approximately one-half of the swab, and packaged the cutting to be sent to Orchid Cellmark Laboratories (Cellmark) for DNA analysis. The swubes collected from Pollack's house were also sent to Cellmark.

B. DNA testing

Matthew Quartaro, a supervisor of forensics at Cellmark, testified at trial. Cellmark is an accredited DNA testing company that works on paternity and criminal cases. Quartaro had been performing DNA testing for approximately eight years and had been a supervisor of forensics at Cellmark for approximately five years. As a supervisor, he performed DNA testing and supervised a team of about 10 DNA analysts.

Quartaro explained that DNA is a chemical found in the cells of the body and, except for identical twins, no two people have the same DNA profile. Cellmark performs DNA comparisons by generating DNA profiles from evidence samples and comparing those profiles to DNA profiles generated from samples taken from known individuals. Cellmark uses “PCR” (polymerase chain reaction) testing to determine the DNA profiles. First, the sample is examined, and a portion of the sample is taken for purposes of generating the DNA profile. Next, the DNA is extracted from the portion. Then, the actual PCR testing is conducted. PCR testing involves the use of a robotic instrument called a thermocycler, which takes about three and a half hours to generate the DNA data. Finally, the data is analyzed. Using a database and computer software developed by the FBI, Cellmark is able to calculate the frequency of a particular DNA profile in the general population.

Quartaro testified that Cellmark performed two instances of DNA testing in connection with this case. The first was when Cellmark received the evidence samples (the swabs taken from Pollack’s house) on March 9, 2007. Cellmark generated profiles for those samples and issued a report on March 19, 2007. The second instance of testing was when Cellmark received the reference saliva sample on June 15, 2007. The profile from the saliva sample was compared to the profiles from the earlier samples and a report was issued on June 26, 2007.

Quartaro stated that he was the one who analyzed the data and generated the reports in this case. In writing the reports he reviewed all documentation in the case file, which contained information pertaining to shipping, the condition of the samples, chain of custody, paperwork from the police department, and bench notes from the analyses.

He stated that all controls were in place and working properly during the DNA testing and that all documentation had been maintained. He examined the data from the generated profiles, compared the DNA profiles to each other, and wrote the reports.

Quartaro testified that two of the samples collected from Pollack's house matched appellant's DNA profile, as obtained from the oral swab. The third sample contained a mixture of two individual's DNA; the major contributor matched appellant's DNA profile. Furthermore, a swabbing taken from a red stain found on a piece of mail at Pollack's house also matched appellant's DNA profile. Quartaro stated that approximately one in 105 quintillion individuals would be expected to have this same DNA profile.

DISCUSSION

A. DNA evidence

Appellant contends that his Sixth Amendment right to confront witnesses against him was violated by the introduction of the DNA test results through the testimony of Quartaro. Appellant asserts that Quartaro did not perform the DNA testing himself, and argues that the prosecution's failure to call the analysts who did the testing left appellant unable to confront adverse witnesses as required by *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305 (*Melendez-Diaz*), and *Bullcoming v. New Mexico* (2011) ___ U.S. ___ [131 S.Ct. 2705] (*Bullcoming*).

Preliminarily, respondent argues that appellant forfeited his confrontation clause claim by failing to object at trial. We agree. (See *United States v. Olano* (1993) 507 U.S. 725, 731 [“‘No procedural principle is more familiar to this Court than that a constitutional right,’ or a right of any other sort, ‘may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it’”]; *People v. Tafoya* (2007) 42 Cal.4th 147, 166 [appellant forfeited confrontation clause claim by failing to raise it at trial]; *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1220 [same].) In any event, regardless of forfeiture, appellant has failed to show any error, as we explain further below.

1. Relevant authority

The confrontation clause of the Sixth Amendment of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” (*Crawford, supra*, 541 U.S. 38.) The confrontation clause has traditionally barred “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” (*Id.* at pp. 53-54.)

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*) the California Supreme Court was called upon to determine the admissibility of a DNA evidence report that was admitted through the testimony of a lab director who cosigned the report. The analyst who performed the testing upon which the report was based did not testify. Instead, the lab director testified that, based on her review of the DNA profiles generated by the analyst, DNA obtained from the crime scene matched that of the defendant.

Noting that the confrontation clause applies only to testimonial statements, not those that are nontestimonial (*Geier, supra*, 41 Cal. 4th at p. 603), the court laid out the following characteristics of a testimonial statement: “(1) it is made to a law enforcement officer or by or to a law enforcement agent and (2) describes a past fact related to criminal activity for (3) possible use at a later trial.” (*Id.* at p. 605.) Concentrating primarily on the second aspect of this definition, the court concluded that the analyst’s report was not testimonial. (*Id.* at pp. 605-607.) It described the report as a “contemporaneous recordation of observable events rather than the documentation of past events,” in which the analyst had “recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks.” (*Id.* at pp. 605-606.) Further, the report was generated as part of the analyst’s employment, not for the purposes of incriminating the defendant, and was not accusatory, since DNA analysis can lead to incriminatory or exculpatory results. (*Id.* at p. 607.) Finally, the accusatory opinions rendered in the case, that the DNA profiles matched, “were reached and conveyed not through the

nontestifying technician's laboratory notes and report, but by the testifying witness,” the lab director. (*Ibid.*)

Two years later, the United States Supreme Court issued a 5-4 decision in *Melendez-Diaz*, where the trial court had “admitted into evidence affidavits reporting the results of forensic analysis which showed that material seized by the police and connected to the defendant was cocaine. The question presented [was] whether those affidavits are ‘testimonial,’ rendering the affiants ‘witnesses’ subject to the defendant’s right of confrontation under the Sixth Amendment.” (*Melendez-Diaz*, *supra*, 557 U.S. at p. 319.) The court determined that, since the affidavits were “functionally identical to live, in-court testimony” and were made to provide prima facie evidence of the composition, quality, and weight of the analyzed substance, under *Crawford* they were “testimonial statements, and the analysts were ‘witnesses’ for purposes of the Sixth Amendment.” (*Melendez-Diaz*, at p. 322.) These “testimonial” documents were therefore not admissible, because the analysts were not subject to cross-examination and the petitioner had no prior opportunity to cross-examine. (*Ibid.*) Further, the affidavits could not be characterized as near-contemporaneous, since they were completed nearly a week after the tests were performed. (*Id.* at p. 324.)

Most recently, in *Bullcoming*, *supra*, 131 S.Ct. 2705, the United States Supreme Court examined whether the confrontation clause “permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.” (*Id.* at p. 2710.) The court concluded that such “surrogate testimony” did not meet the constitutional requirement imposed by the confrontation clause, and that the defendant was entitled to be confronted with the analyst who signed the certification, unless the analyst was unavailable and the defendant had a prior opportunity to cross-examine him. (*Ibid.*)

Only one other justice (Justice Scalia) joined Justice Ginsburg’s *Bullcoming* opinion in full. Justice Sotomayor, who joined in all but part IV of the opinion, wrote a

concurring opinion “to emphasize the limited reach of the Court’s opinion.” (*Bullcoming*, *supra*, 131 S.Ct at p. 2719.) Although Justice Sotomayor agreed that the certification was testimonial, she wrote to “highlight some of the factual circumstances that this case does *not* present.” (*Id.* at pp. 2721-2722.) Among other scenarios, Justice Sotomayor observed that the case was not one “in which the person testifying is a supervisor, reviewer, or someone else with a personal, albeit limited, connection to the scientific test at issue. . . . It would be a different case if, for example, a supervisor who observed an analyst conducting a test testified about the results or a report about such results. We need not address what degree of involvement is sufficient because here [the witness] had no involvement whatsoever in the relevant test and report.” (*Id.* at p. 2722.) Justice Sotomayor further noted that the case was not one in which an expert witness rendered an independent opinion about underlying testimonial reports that were not themselves admitted into evidence.² (*Ibid.*) Moreover, the case did not involve the introduction of “only machine-generated results, such as a printout from a gas chromatograph.” (*Ibid.*) Justice Sotomayor reiterated that none of these factual scenarios was addressed by the court’s opinion. (*Id.* at p. 2723.)

2. Quartaro’s testimony

Applying the foregoing legal authority, we find that appellant’s rights under the confrontation clause were not violated by the testimony of Quartaro. Appellant has failed to show that the prosecution was required to call another Cellmark employee to testify.

First, appellant bases his confrontation clause argument on the assertion that Quartaro did none of the DNA testing himself. Appellant, however, finds no support for this assertion in the record. When testifying regarding the DNA testing, Quartaro generally used the term “we” —e.g., “We generated those profiles and issued a report on March 19, 2007.” Quartaro never stated that another analyst conducted the testing in this

² This is an issue likely to be addressed by the United States Supreme Court in *People v. Williams* (2010) 238 Ill.2d 125, certiorari granted *sub nom. Williams v. Illinois*, June 28, 2011, No. 10-8505.

case. Rather—although Quartaro did not expressly state that he performed the PCR tests at issue—he testified that he frequently performs such testing himself, he testified that he received the oral swab in this case, and he testified that he generated all reports in this case.

As the party claiming error, it falls to appellant to support his claim with citations to the record showing the facts upon which the claim is based. Appellant has failed to show that Quartaro did not perform the DNA testing at issue—the central component of appellant’s argument.³ “Faced with this ambiguity in the record . . . defendant must lose. We must indulge in every presumption to uphold a judgment, and it is defendant’s burden on appeal to affirmatively demonstrate error—it will not be presumed.” (*People v. Garcia* (1987) 195 Cal.App.3d 191, 198; *People v. Wiley* (1995) 9 Cal.4th 580, 592; see also *People v. Green* (1979) 95 Cal.App.3d 991, 1001 [burden is on appellant to present a record showing error].)

Even if we were to presume that the PCR testing was conducted by someone other than Quartaro, however, we would not find grounds for reversal. The factual bases and reasons underlying the findings of confrontation clause violations in *Melendez-Diaz* and *Bullcoming* are not present here.

Unlike in *Melendez-Diaz* and *Bullcoming*, the prosecution in this case did not seek to present laboratory reports, certifications, or other similar documentation. The jury was not asked to determine the validity and accuracy of documents prepared by persons who did not testify and whom appellant did not have the opportunity to confront. Instead, here, the only evidence of the DNA analysis results came from the testimony of Quartaro himself. Quartaro was confronted through cross-examination, and the jury was given a reasonable opportunity to judge his credibility.

³ At the preliminary hearing, Quartaro stated, “we performed the testing.” When asked to explain what he meant by “we,” he stated, “I work with a team of analysts, so it’s, if it’s work that I didn’t do personally, that’s a member of our team.” Counsel for appellant did not seek any further clarification, either at the preliminary hearing or at the time of trial.

This case also differs from *Bullcoming* in that the person testifying, Quartaro, was closely involved in the scientific analysis at issue. The principal evidence in *Bullcoming* was a report certifying that the defendant's blood-alcohol level was well above the threshold for aggravated DWI, but the prosecution did not call the analyst who signed the certification. Instead, a different analyst, who was familiar with the testing procedures but had not participated or observed the test at issue, testified. (*Bullcoming, supra*, 131 S.Ct. at p. 2709.) Here, even if Quartaro did not personally perform the testing, as the supervisor, he would have supervised the analyst who did. As Justice Sotomayor noted, the *Bullcoming* opinion did not reach the issue of whether testimony by a supervisor "with a personal, albeit limited, connection to the scientific test at issue," implicated the confrontation clause. (*Id.* at p. 2722.) More importantly, Quartaro testified that he was the person at Cellmark who analyzed the data and generated the reports in this case. Thus, he clearly had a personal and substantial connection with the testing and generation of results.

Furthermore, even if Quartaro did not personally perform the PCR testing, it can be deduced that he was the person at Cellmark most familiar with the DNA analysis in this case. Quartaro testified that DNA testing at Cellmark is primarily a robot-driven process. The thermocycler, for example, is a robotic instrument that performs the PCR test. *Melendez-Diaz* stated that not everyone "whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case." (557 U.S. at p. 322, fn. 1.) As the person who actually analyzed the data and wrote the reports, Quartaro was clearly the most knowledgeable person who could testify regarding the DNA results. The testimony of another Cellmark employee, who may (or may not) have placed the samples into the robotic thermocycler machine, was not required.

Finally, appellant has failed to show that the data generated by the PCR testing was anything more than the sort of "machine-generated results, [similar to] a printout from a gas chromatograph" that Justice Sotomayor clarified were not addressed by *Bullcoming*. (*Bullcoming, supra*, 131 S.Ct 2705, 2722.) Raw data generated by the PCR

testing was not something on which the jury relied. Rather, Quartaro's testimony rested on his own analysis of the data and the reports he generated from the analysis. The introduction of the DNA results through the testimony of Quartaro, therefore, was entirely proper.

B. Ineffective assistance of counsel claim

Appellant contends that his trial counsel's failure to object on confrontation clause grounds fell below an objective standard of reasonableness. The burden is on a defendant to establish ineffective assistance by a preponderance of the evidence. (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.) There are two elements to an ineffective assistance claim: "[A] defendant seeking relief on the basis of ineffective assistance must show both that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates, and that it is reasonably probable a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Cudjo* (1993) 6 Cal.4th 585, 623, citing *Strickland v. Washington* (1984) 466 U.S. 668.) A reviewing court indulges a strong presumption that counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy. (*Strickland, supra*, at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

Appellant has not met his burden of establishing ineffective assistance. Since Quartaro's testimony was proper and sufficient to introduce the results of the DNA analysis, counsel acted reasonably by not objecting on confrontation clause grounds. Such an objection would not have been meritorious, and there is not a reasonable probability that appellant would have received a more favorable outcome if his counsel had objected. Appellant's ineffective assistance of counsel claim therefore fails.

DISPOSITION

The judgment is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.